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December 11, 2007

DOCKET FILE COPY ORIGINAL

FILED/ACCEPTED
DEC 11 2007
Federal Communications Commission
Office of the Secretary

Marlene H. Dortch
Secretary
Federal Communications Commission
236 Massachusetts Avenue, NE
Suite 110
Washington, D.C. 20002

RE: Reply to Enforcement Bureau's Second Opposition; EB Docket No. 07-197

Dear Madame Secretary:

Enclosed for filing on behalf of parties Kurtis J. Kintzel, Keanan Kintzel, and all other Entities by which they do business before the Federal Communications Commission, is the original and 6 copies of the Reply to the Enforcement Bureau's Second Opposition to the Motion to Modify Issues, in the above-referenced matter.

Sincerely,

Catherine Park, Esq

Catherine Park, Esq.

Enclosures: Original + 6 Copies

No. of Copies rec'd 0+6
List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	EB Docket No. 07-197
Kurtis J. Kintzel, Keanan Kintzel, and all Entities by which they do business before the Federal Communications Commission	)	
	)	
Resellers of Telecommunications Services	)	
	)	
To: Presiding Officer (Richard L. Sippel, Chief ALJ)	)	

REPLY OF THE KINTZELS, ET AL., TO THE ENFORCEMENT BUREAU'S SECOND OPPOSITION TO THE MOTION TO MODIFY ISSUES

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Exhibit B: *In re Applications of John P. Hilmes, et al.*, 14 F.C.C. 2d 597 (1968) (Review Board Memorandum Opinion and Order).

Exhibit C: *In re Applications of John P. Hilmes, et al.*, 12 F.C.C. 2d 862 (1968) (Commission Order designating for hearing the case appended as Exhibit B)

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REPLY OF THE KINTZELS, ET AL., TO THE ENFORCEMENT BUREAU'S SECOND OPPOSITION TO THE MOTION TO MODIFY ISSUES

I. Summary

Kurtis J. Kintzel, Keanan Kintzel, and all Entities by which they do business before the Federal Communications Commission ("the Kintzels, et al."), by and through their undersigned counsel, hereby submit this Reply to the Enforcement Bureau's Second Opposition to the Motion to Modify Issues. The Second Opposition cites *In re Applications of Atlantic Broadcasting*, 5 F.C.C. 2d 717 (1966), but fails to set forth accurately the Commission's guidance in that case on when it is appropriate for presiding examiners to rule on motions to modify issues under 47 C.F.R. § 1.229. *Atlantic Broadcasting* states unequivocally that the Commission has delegated broad discretion to presiding examiners to rule on § 1.229 motions, even in situations where it "might appear to necessitate reconsideration of a Commission action." *Atlantic Broadcasting, supra*, at ¶ 9. Such guidance directly contradicts the Bureau's contentions in its Second Opposition.

The Bureau contends that so long as the Order designating the case for hearing contains the Commission's "reasoned analysis" of an issue, the presiding examiner may not rule on a motion to modify that issue. That is an erroneous statement of the guidance set forth in *Atlantic Broadcasting*. *Atlantic Broadcasting* states that the Commission's "reasoned analysis" must actually deal with the facts or considerations raised in a motion to modify the issue before a presiding examiner is precluded from ruling on such a motion. *Atlantic Broadcasting* directs that because *new* facts or considerations do not form part of the Commission's reasoned analysis in the Order designating the case for hearing, the "reasoned analysis" bar becomes inapplicable with the mere raising of new facts or considerations in a § 1.229 motion, the presiding examiner must perform such reasoned analysis in view of the new facts or considerations, and rule.

The discontinuance of service issue against the accused should be deleted, because 47 C.F.R. § 63.71 (prohibiting discontinuance of service without prior notifications and approvals), by its terms, applies to "carriers" and not resellers. Since the Commission provides no "reasoned analysis" of reseller liability under § 63.71 in the Order, the Presiding Officer may rule on the motion to delete the issue.

A more definite statement of the number of instances of the alleged offenses, dates of occurrence, penalties sought for each alleged instance, and citations to statutes and regulations, must be provided, to correct the problem of defective notice and "duplicitous pleading" (in which separate offenses are alleged in a single count within a charging document). Because the Order contains no "reasoned analysis" of these considerations, the Presiding Officer may rule under § 1.229 and order that each affected issue be modified to provide the requested details (or that a more definite statement be appended to the Order to Show Cause).

Seeking cumulative punishments or successive prosecutions for alleged violations of the

Consent Decree and for the alleged underlying offenses violates the Double Jeopardy Clause. The alleged underlying offenses are "lesser included offenses" of the alleged Consent Decree violations, thus the offenses are the "same offense" under *Blockburger*. To avoid a double jeopardy problem, the issues in the Order must be modified so that only the alleged violations of the Consent Decree, or only the alleged underlying offenses, are prosecuted, but not both, either in a consolidated hearing, or in successive hearings. Because the Order contains no "reasoned analysis" of these considerations, the Presiding Officer may rule.

The amount of proposed penalties ($50 million) should be reduced, because the amounts are constitutionally excessive. To subject the accused to continued prosecution for punishment that exceeds legal limits constitutes harassment and bad-faith prosecution. Because the Order contains no "reasoned analysis" of these considerations, the Presiding Officer may rule that the issues be modified to reflect reduced penalties that are within constitutional limits.

Finally, the Order contains no "reasoned analysis" as to why individual liability is sought against Kurtis J. and Keanan Kintzel. The Order alleges no fraud or injustice that would justify veil-piercing under existing law. The Order gives no notice to the accused why individual liability is being sought against them, and provides no information about the acts alleged to have been committed that would expose the accused to such Commission action. Under *Atlantic Broadcasting, supra*, the Presiding Officer may rule on the motion to remove individual liability from each issue.

II. *Atlantic Broadcasting* makes clear that the Commission has delegated broad discretion to the presiding examiners to rule on motions to modify issues under 47 C.F.R. § 1.229.

The Second Opposition purports to rely on *In re Application of Atlantic Broadcasting, et al.*, 5 F.C.C.2d 717 (1966), to contend that the Presiding Officer should (1) deny the request to delete the discontinuance of service issue in Section VI of the Motion to Modify Issues, and (2) decline to consider Sections III, IV, V, and VII as inappropriate for resolution under 47 C.F.R. § 1.229. Second Opp., p. 2, 6. However the Second Opposition fails to set forth accurately the Commission's guidance in *Atlantic Broadcasting* on when it is appropriate for presiding examiners to rule on § 1.229 motions—perhaps because the Commission's guidance in that case is highly unfavorable to the Bureau's arguments, and makes clear that the Presiding Officer has broad discretion to rule on § 1.229 motions, even in situations where it "might appear to necessitate reconsideration of a Commission action." *Atlantic Broadcasting, supra*, at ¶ 9.

This directly contradicts the Bureau's contention in its Second Opposition that only the Commission may rule on the types of modifications requested in the Motion to Modify Issues. Second Opp., p. 10. (The *Atlantic Broadcasting* case is appended as Exhibit A.)

Atlantic Broadcasting states generally that, with respect to ruling on a motion to modify issues, if an Order designating a case for hearing contains the Commission's "reasoned analysis" of a matter, "in the absence of additional information on the subject previously unknown to us," the presiding examiner should adopt the analysis and deny the relief. *Atlantic Broadcasting,* at ¶ 10. *Atlantic Broadcasting* also states that where the movant alleges new facts or considerations overlooked by the Commission at the time it designated the Order, the reasoned analysis bar is inapplicable, and the presiding examiner should perform a reasoned analysis in view of the new facts and considerations, and rule on the motion. *Id. Atlantic Broadcasting* states that a more "narrow construction" of the presiding examiners' authority would disrupt orderly administration of proceedings, by causing, inter alia, an "increase in the number of interlocutory petitions which

we must consider." *Id.*, at ¶ 10.

The Bureau's Second Opposition contains a single quote from *Atlantic Broadcasting* that, removed from its context, seems to suggest that the Presiding Officer's authority to rule on § 1.229 motions is contrary to what the Commissioners held in that case. The quote from *Atlantic Broadcasting* is contained in paragraph 4 of the Second Opposition ("in considering a motion to delete issues from a hearing designation order, the Presiding Judge must determine 'whether specific reasons are stated for [Commission] action or inaction ... rather than merely considering whether the petitioner relies on new facts or whether [the Commission was] aware of the general matter upon which [the presiding offer] [sic] relies.'" Second Opp., p. 2.)

That quote, removed from its context, seems to suggest that the Presiding Officer may not rule on a motion to modify an issue so long as the Commission's Order gives specific reasons for its action or inaction on that issue, even if the movant has alleged new facts or circumstances not considered by the Commission when it designated the Order. In fact, *Atlantic Broadcasting* states just the opposite. *Atlantic Broadcasting, supra*, at ¶¶ 9-10. The Commission in *Atlantic Broadcasting* accepts as a given that the mere raising of new facts and considerations makes the "reasoned analysis" bar inapplicable, and the presiding examiner is directed to rule in such situations.[1] The Commission in *Atlantic Broadcasting* also goes on to enlarge the presiding examiners' authority even where no new facts or considerations are alleged. *Id.*, at ¶ 9 ("the failure to allege previously unknown facts would not, in itself, be a sufficient reason for the

[1] *Atlantic Broadcasting , supra*, at ¶ 9: "[in] Fidelity Radio, supra, ... we indicated that those subordinate officials would have broad discretion to consider such matters even though this might appear to necessitate reconsideration of a previous Commission action. We pointed out that, where there has been a thorough consideration of the particular question in the designation order, the subordinate officials would be expected, *in the absence of new facts or circumstances,* [emphasis added] to follow our judgment as the law of the case. But we added that the subordinate officials would be justified in reaching a different conclusion with respect to a particular question when it is established that we had not fully considered the matter in the designation order."

subordinate officials to deny such interlocutory requests").[2]

A decision tree as to when it is appropriate for a presiding examiner to rule on a § 1.229 motion can be synthesized from *Atlantic Broadcasting*, as follows:

1. If new facts or considerations are alleged in a motion to modify issues, the "reasoned analysis" bar is inapplicable (since the new facts and considerations could not have informed the Commission's reasoned analysis) and the presiding examiner must rule on the motion to modify issues.[3]
2. But even where no new facts or considerations are alleged, the presiding examiner must examine the specific reasons given for the Commission action to determine whether or not the Commission has fully considered the issue.[4]
3. If it is apparent from the Commission's "reasoned analysis" that the Commission has not fully considered the issue for which modification is requested, the presiding examiner must conduct a reasoned analysis and rule on the interlocutory motion to modify the issue, in the interest of conducting an "orderly and expeditious" hearing.[5]

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[2] *Atlantic Broadcasting* is an appeal to the Commission of a presiding examiner's (the Review Board's) denial of a motion to enlarge issues, in which the denial was issued "[w]ithout considering the merits of [the] petition" on the ground that "its [the Review Board's] delegated authority permits it to change the designated issues only when it is justified by newly discovered factual allegations or when it is shown that some matters have been overlooked by the body designating the matter for hearing." *Id.*, at ¶ 5.

[3] *Id.*, at ¶ 10 ("in the absence of additional information on the subject previously unknown to us, the subordinate officials will have no difficulty in adopting that analysis [the Commission's "reasoned analysis" in the designation Order] .... But where the designation order contains no reasoned analysis with respect to the merits of the particular matter, the subordinate official should make such an analysis and rule on the merits of the petition").

[4] *Id.*, at ¶ 9 ("the failure to allege previously unknown facts would not, in itself, be a sufficient reason for the subordinate officials to deny such interlocutory requests").

[5] *Id.*, at ¶ 10 ("where the designation order contains no reasoned analysis with respect to the merits of that particular matter, the subordinate official should make such an analysis and rule on the merits of the petition so that the hearing may be conducted in an orderly and expeditious manner.")

The presiding examiner (the Review Board) in *Atlantic Broadcasting* was chided by the Commission for such a "narrow construction ... of its authority" which would cause "the parties, in order to obtain a resolution of the merits of their requests, to file additional applications for review, which multiply the legal pleadings required of the parties, which necessitate duplication of previous efforts of our staff, and which increase the number of interlocutory petitions which we must consider." *Id.*, at ¶ 10.

The Commission states that it "emphasized in Fidelity Radio that we would no longer consider such interlocutory requests and that they should thereafter be directed to the Review Board and the presiding examiner. In order to give the public and the subordinate officials guidance as to the manner in which such pleadings should be handled in the future, we indicated that those subordinate officials would have broad discretion to consider such matters even though this might appear to necessitate reconsideration of a Commission action." *Atlantic Broadcasting, supra*, at ¶ 9.

The Bureau's Second Opposition propounds erroneous contentions regarding the limits on the presiding examiner's authority to act on any request in the Motion to Modify. Second Opp., p. 10. However, as shown in the foregoing, the Commission directly contradicts such a narrow construction of the presiding examiners' authority in *Atlantic Broadcasting, supra*. The Bureau's pleadings actually cite no authority for the proposition that the Presiding Officer may not rule on the Motion to Modify Issues, but only point to the rule stating that a "petition for reconsideration" must be acted upon by the Commission, and that the Motion to Modify Issues is a petition for reconsideration, thus the Presiding Officer may not rule. Second Opp., p. 5. The Kintzels, et al., on numerous occasions have refuted the Bureau's meritless contention about the

"petition for reconsideration" that was never asked for,[6] and do so here again.

The remainder of this pleading applies the guidance in *Atlantic Broadcasting* to show that each request in the Motion to Modify Issues is appropriate for resolution under § 1.229, contrary to the Bureau's erroneous contentions in its Second Opposition.

III. The discontinuance of service issue is ripe for decision under § 1.229, and the issue should be deleted.

Since the FCC is seeking redress of alleged discontinuance of service under 47 C.F.R. §

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[6] The Bureau, in its Second Opposition, mentions that the Kintzels, et al., were ordered by the Presiding Officer to file a consent motion to withdraw the Motion to Modify Issues from the Commission docket and to resubmit the pleading to the Presiding Officer with a new first page of the pleading, naming the Presiding Officer in the caption (the original Motion to Modify Issues did not name the responsible officer in the caption, under 47 C.F.R. § 1.209; § 1.209 is not well-drafted to be comprehensible to non-FCC attorneys, there is no specimen diagram accompanying the rule, and the rule has no analogue in the Federal Rules of Civil Procedure or Federal Rules of Appellate Procedure—both of which provide specimen diagrams of pleading captions in appendices).

When the Bureau filed its First Opposition to the Motion to Modify Issues, the Bureau directed its pleading to "The Commission," and erroneously contended that the Motion to Modify Issues was directed to the Commission and was actually a petition for reconsideration in disguise, although the Motion to Modify Issues was and always had been intended for decision by the Presiding Officer, and "petition for reconsideration" was mentioned nowhere in the pleading. *See* Mot. to Modify. The Motion to Modify Issues was filed in the Office of the FCC Secretary with the original and 6 copies, as required for all pleadings intended for decision by an ALJ. *See* filing copy in EFCS (stamped as "O + 6"). A courtesy copy of the Motion to Modify Issues was faxed to the Office of ALJs. The Commission was not named in the caption of the pleading. Thus there was no reason for the Commission to assume that the Motion to Modify Issues was intended for itself until the Bureau propounded such erroneous contention in its First Opposition. First Opp., p. 2-3.

Upon receipt of the Bureau's First Opposition, which was addressed to the Commission, naturally the Commission assumed that the pleading to which the First Opposition was responsive (Motion to Modify Issues) was also directed to itself. A consent motion had to be filed by the Kintzels, et al., to withdraw the Motion to Modify Issues from the Commission docket. This was agreed to by the Kintzels, et al., to remedy the actions of the Bureau, which again erroneously insisted during the prehearing conference held on November 15, 2007, that the Motion to Modify Issues "as it was framed, it was addressed to the Commission," transcript, p. 23, although by the time of the prehearing conference, the Kintzels, et al., had already submitted a Reply to the First Opposition, in which the Kintzels, et al., communicated in no uncertain terms that the Motion to Modify Issues was intended to be ruled upon by the Presiding Officer, had always been intended for a ruling by the Presiding Officer, and that the Bureau's insistence that the Motion was directed to the Commission was completely erroneous. Reply to First Opp., p. 2-4. Even so, at the prehearing conference, the Bureau continued to propound its assertion, stated that it knew for a fact that the Motion to Modify Issues had been entered on the Commission's docket, that the Commission could theoretically could rule on it, thus the Presiding Officer should not rule on the Motion to Modify Issues because of the risk of conflicting rulings (a risk caused by the Bureau's own groundless persistent assertions that the Motion to Modify Issues was actually a petition for reconsideration, and that it was intended for the Commission) until a consent motion to withdraw the Motion to Modify Issues from the Commission docket was filed. Transcript, pp. 24-25. Such actions by the Bureau have placed considerable obstacles in the way of getting the Motion to Modify Issues before the Presiding Officer for ruling.

63.71 (prohibiting discontinuance of service without prior notifications and approvals), the FCC must take action against Qwest, not against resellers of Qwest service (the Kintzels, et al.). By its terms, § 63.71 implicates "carriers," not resellers. 47 C.F.R. § 63.71. The Motion to Modify Issues raises this new consideration about the discontinuance of service issue—reseller liability under § 63.71. Mot. to Modify, p. 14-15. Since reseller liability is not discussed in a reasoned analysis by the Commission in the Order to Show Cause, the Presiding Officer may rule on the motion to delete the issue. *See Atlantic Broadcasting, supra*, at ¶¶ 9-10.

The Bureau's Second Opposition contends that the Commission was aware that the Kintzels, et al., were resellers, and that this proves that the Commission considered and rejected the possibility of seeking action against Qwest for the discontinuance of service, rather than the Kintzels, et al. *See* Second Opp., p. 2.

However the Review Board, interpreting the Commission's guidance in *Atlantic Broadcasting*, has stated that it is not enough that the Commission may have been aware of a consideration raised in a motion to modify issues; the designation Order actually must have dealt with the consideration to preclude the presiding examiner from modifying that issue. *In re Applications of John P. Hilmes, et al.*, 14 F.C.C. 2d 597, ¶ 4 (1968). (The *Hilmes* case is appended as Exhibit B.[7])

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[7] In *Hilmes*, the movant sought enlargement of an issue after designation of the case for hearing, arguing that an adverse party's proposal for a construction permit might violate a U.S.-Mexico treaty. *Id.*, at ¶ 2. The motion was opposed by the adverse party, who argued that "this matter was raised prior to designation by the Commission in a letter ... and resulted in an amendment to [the party's] application." *Id.*, at ¶ 3.

The presiding examiner (the Review Board), citing Atlantic *Broadcasting, supra*, ruled that "[a]lthough the problem raised here may have been inquired into when the application was tendered for filing," the question of the possible treaty violation was raised by petitioner with respect to a slightly different technical factor than the one considered by the Commission. *Id.*, at ¶ 4. The Review Board also emphasized that the matter "was not considered in the designation order, and therefore the Board is not foreclosed from consideration of the merits of the petition." *Id.*, at ¶ 4 (citing *Atlantic Broadcasting, supra*). (The Commission Order designating the *Hilmes* case for hearing is appended as Exhibit C.)

The Review Board stated that, because the U.S.-Mexico treaty, while considered by the Commission in evaluating the application, "was not considered in the designation order"[7]—indeed, the designation Order contains no mention at all of the U.S.-Mexico treaty[7]—the Order did not contain the reasoned analysis required by *Atlantic*

There is no reasonable dispute that the Kintzels, et al., as resellers of Qwest service, did not have physical access to the facilities and could not have physically shut off service to those customers in November 2006. *See* Order, p. 1. 47 C.F.R. § 63.71, by its terms, refers to "carriers" and does not contemplate resellers; the intent of the drafters is evident in the text of the regulation. It would be fundamentally unfair (thus a violation of due process) to subject a party to potential liability for non-compliance with a regulation in which compliance is physically beyond the party's control. *See Santosky v. Kramer*, 455 U.S. 745, 775 (1982) (due process requires "fundamental fairness"). 47 C.F.R. § 63.71 by its terms is not applicable to resellers, and that consideration was not dealt with by the Commission in its reasoned analysis. *See* Order, p. 4 (no mention of "reseller liability under § 63.71"). Thus the motion for deletion is permissible under *Atlantic Broadcasting, supra,* and *Hilmes, supra.*

To subject the reseller to liability for the actions of the underlying carrier punishes the reseller for the actions of the carrier, while permitting the carrier to escape liability. The fact that the underlying carrier will likely be a large business, and the reseller a small business, illustrates the undue burden of the regulation if applied to resellers. The intent of the drafters is evident in the text of § 63.71, which is aimed at "carriers" and does not contemplate resellers. Thus, if the FCC seeks to hold an entity liable for the discontinuance of service to customers in November 2006 under § 63.71, the FCC must seek action against Qwest, not against the Kintzels, et al.

If action to redress the discontinuance of service were pursued against Qwest, this would place the burden of litigation (including legal fees) where it belongs as contemplated by § 63.71—on the carrier, Qwest. It may be that the Kintzels, et al., would be deposed in such a proceeding to give evidence; however, to place the initial burden of defense on the Kintzels, et

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Broadcasting, supra, either as to the treaty as a broad issue, or as to the new fact raised by the movant that could implicate the treaty (since the new fact was not before the Commission at the time it designated the case for hearing). *Hilmes, supra,* at ¶ 4. The Review Board concluded that it was authorized to modify the issue.

al., is legally incorrect, under § 63.71, which places the liability squarely on carriers, not on the resellers.

The Kintzels, et al., are not in violation of § 63.71 for the foregoing reasons, thus the issue of discontinuance of service should be deleted.

The Bureau's Second Opposition argues that a decision on the discontinuance of service issue is not appropriate under § 1.229, but must be cast as one for summary decision. Second Opp., p. 3-5. The Bureau then vehemently argues that summary decision should not be granted. *Id.* The Kintzels, et al., state here unequivocally that they have moved for deletion of the issue, not summary decision. Mot. to Modify, p. 14-15. The Bureau's tactic—setting up a straw man argument (the purported summary decision option) so that it may be energetically knocked down—is identical to that propounded in its First Opposition, in which the Bureau groundlessly insisted that the Motion to Modify Issues was not actually a motion to modify issues at all, but a petition for reconsideration, then vehemently insisted that such petition should not be granted. First Opp., p. 2-3.

The Kintzels, et al., request that the Presiding Officer ignore the Bureau's contentions as to the procedural nature of this and any other pleadings filed by the Kintzels, et al., since such meritless contentions by the Bureau have already caused the Motion to Modify Issues to be misdirected to the Commission rather than to the Presiding Officer (Richard L. Sippel, Chief ALJ).[8] The Bureau's argument that the discontinuance of service issue should not be decided as a motion to delete the issue, but as a motion for summary decision, must be ignored. The Kintzels, et al., have not moved for summary decision. To give effect to the Bureau's erroneous contention could derail the course of this proceeding yet again and interpose more delay in

[8] *See* footnote 6, above.

obtaining a ruling under § 1.229, governing motions to modify the issues, which the Kintzels, et al., have been seeking for the past several weeks.[9]

IV. The request for a more definite statement may be granted under § 1.229, and is required by the Administrative Procedure Act, and the Due Process and Double Jeopardy Clauses of the U.S. Constitution.

Under the Administrative Procedure Act, the accused in an agency adjudication must be "timely informed of ... the matters of fact and law asserted." *See* 5 U.S.C. § 554(b)(3). The Bureau insists that a more definite statement is "unavailable and unjustified." Second Opp., p. 11. The refusal to set forth a more definite statement violates the Administrative Procedure Act and the Due Process rights of the accused to notice and an opportunity to be heard. *E.g., Fuentes v. Shevin*, 407 U.S. 67, 80 (1973). Such notice and opportunity to be heard must be granted "at a meaningful time and in a meaningful manner." *Id.*, at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). As in the instant proceeding, notice that fails to provide the accused with information minimally necessary to prepare a defense, even failing to provide the dates on which the alleged offenses are supposed to have occurred, is constitutionally defective notice. Such notice deprives the accused of the means to prepare a defense, without which the accused is further denied a "meaningful" opportunity to be heard. *See id.*

The Motion to Modify Issues requests that the Commission be ordered to produce the following details: (1) the number of instances of each alleged violation (2) the date of occurrence of each alleged instance (3) the amount of the forfeiture proposed for each alleged instance and (4) the authority upon which the amount of each forfeiture is based (with citations to regulations

[9] The Motion to Modify Issues was filed on October 26, 2007. *See also* footnote 6, above.

and enabling statutes). Mot. to Modify, p. 3. Without the requested detail, the Order to Show Cause is defective as a charging instrument, failing to inform the accused even of the particular acts that are alleged to be offenses. In technical terms, the Order violates the prohibition against "duplicitous pleading," discussed in Federal Rule of Criminal Procedure 8(a):

> "(a) Joinder of Offenses. The indictment or information may charge a defendant *in separate counts* [emphasis added] with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." F. R. Crim. P. 8(a).

The Order to Show Cause joins numerous offenses in a single charging instrument, but fails to set forth each offense as a separate count. *See* Order, pp. 9-10. The offenses are grouped into "issues," and the accused left guessing as to how many times they are alleged to have violated each Commission rule or statutory section, and as to when these alleged instances are supposed to have taken place.

On duplicitous pleading, the U.S. Court of Appeals for the Fifth Circuit observed that "the test for determining whether several offenses are involved is whether identical evidence will support each of them, and if any dissimilar facts must be proved, there is more than one offense." *U.S. v. Bins*, 331 F.2d 390, 393 (5th Cir. 1964) (citing *Blockburger v. U.S.*, 284 U.S. 299 (1915)). In the instant proceeding, *each instance* of each alleged violation constitutes a "separate offense" under the *Bins* test, because the evidence required to prove each instance is unique from the

evidence required to prove every other instance.

To illustrate: The accused are alleged to have violated Rule A on May 1, May 2, and May 3. Unique evidence is required to prove the violation on May 1, unique evidence to prove the violation on May 2, and unique evidence to prove the violation on May 3. Thus each instance of each alleged violation is a separate offense under *Bins*, and must be stated in a separate count (or, alternatively, details set forth in a more definite statement or "bill of particulars," in the criminal-law context). *See Bins, supra*, at 393; *see* F. R. Crim. P. 8(a).

The current version of the Order is defective under *Bins*, conveying only that Rule A was violated sometime between the years 2004 and 2006, a great many number of times, and that a more definite statement is "unavailable and unauthorized." Second Opp., p. 11. The accused cannot prepare a substantive defense if the Order fails to disclose even minimally necessary information such as when the alleged offenses are supposed to have taken place.

The mention of *Blockburger* in a case that discusses duplicitous pleading (*Bins, supra*), demonstrates that duplicitous pleading is closely related to the problem of double jeopardy (which prohibits, inter alia, cumulative punishments for the same offense, unless specifically authorized by Congress, *Missouri v. Hunter*, 459 U.S. 359, 366-67 (1983)). Impermissible joinder of separate offenses in a single count increases the risk that even if found innocent of violating Rule A on May 1 and May 2, the accused may be subjected, in a later prosecution, to trial again for violating Rule A on May 1 and May 2. Such risk is inherent when the charging instrument lacks detail, because the accused is not provided with a statement setting forth the charges on which he has already been tried. *See U.S. v. Murray*, 618 F.2d 892, 896 (2d Cir. 1980) ("the prohibition of duplicity is said to implicate a defendant's rights to notice of the charge against him, to a unanimous verdict, to appropriate sentencing and to protection against

double jeopardy in a subsequent prosecution").

The risk of injustice caused by the failure to set forth detail is further demonstrated by the Bureau's reference to the Debt Collection Improvement Act of 1996 in its Second Opposition. Second Opp., p. 12. The Bureau makes reference to that statute, apparently in response to the Motion to Modify Issues, which states that the proposed penalties seem to exceed the statutory ceiling on penalties against common carriers in 47 U.S.C. § 503(a)(2)(B) (Section 503 of the Communications Act of 1934). Mot. to Modify, p. 3. Apparently in response, the Bureau's Second Opposition states that the higher penalties are authorized under 47 C.F.R. § 1.80(b), which the Bureau contends raised the statutory ceiling of Section 503 to adjust for inflation under the Debt Collection Improvement Act of 1996. Second Opp., p. 12, n.44.

However, that Act permits federal agencies to adjust only "civil monetary penalties" for inflation, not punitive fines. Pub. L. 104-134, Title III, § 31001(s)(1), Apr. 26, 1996 (amending Federal Civil Penalties Inflation Adjustment Act of 1990, Pub.L. 101-410, Oct. 5, 1990). Since the penalties proposed in the Order to Show Cause are punitive fines, Mot. to Modify, p. 4-5, the Commission's action in seeking the enhanced penalties in the instant proceeding against the Kintzels, et al., may not be authorized. When a civil statutory scheme is used to seek to impose complete and irreversible disability upon the accused through punitive fines not specifically authorized by Congress, the action exceeds the permissible purposes of the statute and is subject to attack under the Excessive Fines Clause. *See* Mot. to Modify, pp. 4-6. Thus the accused require details such as the legal authority upon which the proposed penalties are based. If citations to regulations and enabling authority are not provided for each alleged instance for which a penalty is sought, the accused cannot prepare a defense, and are deprived of a "meaningful" opportunity to be heard. *Fuentes, supra*, at 80.

Because the Order contains no "reasoned analysis" of the foregoing considerations, the Presiding Officer may rule under § 1.229, and order that a more definite statement be produced setting forth (1) the number of instances of each alleged violation (2) the date of occurrence of each instance (3) the amount of the forfeiture proposed for each instance and (4) the authority upon which the amount of each forfeiture is based (with citations to regulations and enabling statutes). The more definite statement can be used to modify each affected issue, or simply appended as an exhibit to the Order to Show Cause.

V. To prevent double jeopardy problems, the issues should be modified to prevent prosecution and punishment of both the alleged Consent Decree violations and the alleged underlying offenses, either in a consolidated hearing or in successive hearings.

Under the *Blockburger* test, two offenses are not the "same offense" for double jeopardy purposes if "each ... requires proof of a fact which the other does not." *Missouri v. Hunter*, 459 U.S. at 366 (quoting *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932)). To reiterate, "each" offense must require proof of a fact that the other does not. *Id.* The Bureau, in its Second Opposition, apparently neglects the word "each" because it declares, upon performing only one-half of the *Blockburger* analysis, that since the Consent Decree violations require proof of facts that the underlying violations do not, the offenses are not the same for double jeopardy purposes. Second Opp., pp. 8-9, n.28.

Had the Bureau performed the second-half of the *Blockburger* analysis, the Bureau would have found that the underlying violations do not require proof of any facts not also required to prove the Consent Decree violations. Thus the underlying offenses are "lesser included offenses" of the greater offenses (the Consent Decree violations). *See U.S. v. Dixon*, 509 U.S.

688, 698 (1993) (discussing felony-murder, and the underlying felony as a "species of lesser included offense," quoting *Illinois v. Vitale*, 447 U.S. 410, 420 (1980)). The Double Jeopardy Clause prohibits successive prosecutions and cumulative punishments for greater and lesser included offenses, regardless of the sequence of prosecution. *Brown v. Ohio*, 432 U.S. 161, 169 (1977).[10]

The Bureau in its Second Opposition contends that, since "complete identity" does not exist between the alleged Consent Decree violations and the alleged rule violations, double jeopardy is not implicated. Second Opp., p. 9, n.28. But "complete identity" is not the test. *Blockburger* does not require "complete identity" for the offenses to be considered "the same offense." *Blockburger, supra*, at 304. If one of the offenses does not require proof of a fact that the other does not, it is a lesser-included offense, and the two offenses are the "same offense" under *Blockburger*. *See U.S. v. Dixon, supra*, at 698.

Under *Atlantic Broadcasting, supra*, since the Order does not contain a reasoned analysis of the double jeopardy problem created by imposing cumulative punishments for the alleged Consent Decree violations and the alleged underlying offenses, the presiding examiner may rule under § 1.229 to correct the double jeopardy problem. *Atlantic Broadcasting*, at ¶¶ 9-10.

The double jeopardy problem can be remedied by proceeding with the hearing either to prosecute only the alleged violations of the Consent Decree, or only the alleged underlying offenses, but not both—either in the same proceeding, or in successive proceedings—because the Double Jeopardy Clause prohibits successive prosecutions and cumulative punishments for the "same offense." *Brown v. Ohio*, 432 U.S. 161, 169 (1977).

[10] An exception may exist as to sequence, if prosecution on the greater charge cannot proceed at the outset because the additional facts required to prove the greater charge have not occurred or have not been discovered despite the exercise of diligence. *Brown, supra*, at 169, n.7. This potential exception is inapplicable to the instant proceeding, since the greater and lesser offenses are both alleged in the Order, and the additional facts establishing the alleged greater offense are available to the prosecution.

The remedy would necessitate deleting the alleged Consent Decree violations, or the alleged underlying offenses, from the Order. Deletion is permissible under § 1.229, and akin to granting a "Motion to Dismiss" counts in a criminal indictment, or "Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted," under Federal Rule of Civil Procedure 12(b)(6). Motions to Dismiss are granted routinely when the law justifies, and the Presiding Officer is authorized under § 1.229 to exercise that authority that every judge in every adjudicatory context possesses, in the interest of the orderly administration of justice. *See, e.g., Atlantic Broadcasting, supra*, at ¶ 10; Fed. R. Crim. P. 14(a) (motion for relief from prejudicial joinder of offenses); Fed. R. Crim. P. 12(b)(3)(A) ("motion alleging a defect in instituting the prosecution"); F. R. Civ. P. 12(b)(6) ("motion to dismiss for failure to state a claim upon which relief can be granted").

VI. The Presiding Officer should order modification of each issue, under § 1.229, to reflect reduced penalties that are not constitutionally excessive.

The Bureau argues that $50 million in proposed penalties need not be reduced, because merely *proposed* penalties, which have not yet been imposed. Second Opp., p. 7. The argument is meritless, as demonstrated by the Equal Access to Justice Act, 5 U.S.C. § 504, which provides inter alia for the recovery of legal fees and costs of defending against an action instituted by a federal agency where either (1) the action was substantially unjustified, or (2) the amount of the penalties sought was substantially unjustified. *Id.* The fact that a prevailing party can recover under the Equal Access to Justice Act based on the *proposed* amount of penalties demonstrates that harm is caused by the mere institution of such prosecution where excessive and unjustified penalties are sought. *Id.*

There is no indication in the Order that the Commission considered and rejected the Excessive Fines analysis—indeed, if it had, the Commission surely would not be seeking $50 million in penalties. The Presiding Officer may rule under § 1.229 that the issues be modified to reflect reductions in the proposed penalties. *See Atlantic Broadcasting, supra*, at ¶¶ 9-10. If there is no reasonable dispute that the proposed penalties are constitutionally excessive, continued prosecution for such amounts violates the rights of the accused to be free from unjustified prosecution, and subjects them to intentional infliction of emotional distress.

The Motion to Modify Issues discusses Excessive Fines jurisprudence in the context of federal agency actions. Mot. to Modify, pp. 4-5. The Motion to Modify Issues also emphasizes that the FCC is seeking $50 million in penalties for relatively benign reporting offenses that never endangered anyone's life or property, and caused no irreparable environmental damage. *Id.*, pp. 4-9. Furthermore, new facts are alleged that may explain the alleged non-responsiveness, non-payment, and slamming complaints. *Id.*, pp. 6-9.

Under *Atlantic Broadcasting, supra*, because the foregoing new facts and considerations are raised, the presiding examiner may rule on the motion, and may order modification of the issues to reflect reduced penalties that are within constitutional limits.

VII. The Order contains no "reasoned analysis" as to why individual liability is sought against Kurtis J. and Keanan Kintzel, thus the Presiding Officer may rule on the motion and order that individual liability be deleted from each issue.

Contrary to the Bureau's insistence in its Second Opposition that "the Commission thoroughly considered the inclusion of the Kintzel Brothers as parties in this proceeding .... For Example the Commission took into consideration the Kintzel Brothers' ownership and control of

the various entities covered by the Order to Show Cause," Second Opp., p. 10, the Order contains no such reasoned analysis. The Order contains, rather, a narrative that mentions the Kintzels and their companies, but offers no reasoned analysis for seeking individual liability, and offers no discussion of the legal ramifications of imposing individual liability, which would necessitate piercing the corporate veil.

Just as there is no reasoned analysis for proposing an astounding $50 million in penalties for relatively benign reporting offenses and alleged non-responsiveness to FCC inquiries, there is likewise no reasoned analysis explaining the Commission's rationale for seeking individual liability. Thus, under *Atlantic Broadcasting, supra*, the presiding examiner can rule on a § 1.229 motion to remove individual liability from each issue.

The Motion to Modify Issues (filed October 26, 2007) and the Reply to the First Opposition (filed November 7, 2007) contain thorough discussions of the limited liability of shareholders of corporations. Mot. to Modify, pp. 16-18; Reply to First Opp., pp. 5-6.[11] If the FCC plans to pierce the corporate veil, it must provide a reasoned analysis in the charging instrument for seeking to do so. *See Atlantic Broadcasting, supra*, at ¶¶ 9-10. The Commission is without authority to pierce the corporate veil merely to punish Kurtis J. and Keanan Kintzel for the violations alleged against their companies, because such Commission action would contravene the law of limited liability. *See, e.g., Vuitch v. Furr*, 482 A.2d 811, 815 (D.C. 1984)

[11] The following is an excerpt from the Reply to the First Opposition (in case the misdirection caused by the erroneous routing of the Motion to Modify Issues to the Commission also caused misrouting of the Reply to the First Opposition, as well): "The limited liability afforded to shareholders of corporations through the 'corporate veil' has been called 'the most important legal development of the 19th Century.' *Labadie Coal Co. v. Black*, 672 F.2d 92, 96 n.16 (D.C. Cir. 1982). Without the limited liability protection of corporations, industrialization would not exist, because the risk of individual liability would be too great for anyone to build a business. *See id.*, at 96-97. Corporate entities are afforded a high level of judicial deference for that reason, and the veil will be pierced only in cases of fraud or injustice. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003); *see Labadie, supra*, at 99.

"The Order to Show Cause fails to allege any instances of fraud or injustice that would justify veil-piercing under existing law.... The Bureau's Opposition also completely sidesteps the issue of case law dating from the 19th Century on the limited liability protection afforded to corporations, and high legal standard required for veil-piercing."

("[t]he general rule is that a corporation is regarded as an entity separate and distinct from its shareholders").

Veil-piercing is permitted only in exceptional circumstances, such as to prevent fraud or injustice. Mot. to Modify, pp. 16-18; Reply to First Opp., pp. 5-6. Fraud or injustice are not alleged in the Order, no reasoned analysis given as to why the Commission is seeking individual liability, and no statement provided as to the legal authority relied upon for such extraordinary action. In view of well-established legal precedent against piercing the corporate veil except to remedy fraud or injustice, individual liability against Kurtis J. and Keanan Kintzel should be removed from each issue.

VIII. Conclusion.

Wherefore, the Kintzels, et al., respectfully request that the Motion of the Kintzels, et al., to Modify the Issues, or, in the Alternative, Statement of Objections to the Order to Show Cause, be granted.

Respectfully Submitted,

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Exhibit A

H

8 Rad. Reg. 2d (P & F) 991, 5 F.C.C.2d 717, 1966 WL 13933 (F.C.C.)

*1 In re Applications of ATLANTIC BROADCASTING CO. (WUST), BETHESDA, MD. For Construction Permit; ATLANTIC BROADCASTING CO. (WUST), BETHESDA, MD. For Renewal of License; BETHESDA-CHEVY CHASE BROADCASTERS, INC., BETHESDA, MD. For Construction Permit

MEMORANDUM OPINION AND ORDER

(November 23, 1966 Adopted)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND WADSWORTH ABSENT; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. This proceeding involves the mutually exclusive applications of: (a) Atlantic Broadcasting Co. (hereinafter WUST) for renewal of its license for standard broadcast station WUST, Bethesda, Md., and for a construction permit to increase its power at that station on 1120 kc from 250 w to 5,000 w, with 1,000 w during critical hours, daytime only, in Bethesda, Md.; and (b) Bethesda-Chevy Chase Broadcasters, Inc. (hereinafter B-CC), for a construction permit for a new standard broadcast station to operate on 1120 kc, 250-w power, daytime only, in Bethesda, Md. These applications were designated for hearing by our order (FCC 66-526), released June 16, 1966, on issues to determine: (a) Areas and populations to be served; (b) whether B-CC is financially qualified; (c) whether WUST's proposal to increase power will provide a realistic local transmission facility for Bethesda or for another larger community and, if the latter, whether WUST will meet all of the technical provisions of the rules for that larger community; and (d) which of the proposals would better serve the public interest.

2. Each of the applicants requested the Review Board to enlarge those designated issues in certain respects, and each of the applicants has now filed an application for review of the Board's actions denying the requested relief. We have considered WUST's application for review of the Review Board's memorandum opinion and order (FCC 66R-375, released September 30, 1966), filed October 7, 1966; and the oppositions thereto filed October 19, 1966, by B-CC and the Chief, Broadcast Bureau; and we have concluded that review is not required of the Board's action except with respect to WUST's request for a disqualifying issue concerning some of B-CC's principals' ownership interest in an advertising agency. The Board merely held that such an issue was not required, since it was not aware of any Commission case, rule, or policy which would preclude overlapping ownership interests of this character. It is clear, however, that the absence of a specific statement of policy would not be dispositive of this request, if the merits of WUST's pleadings had raised a serious public-interest question. See Charles County Broadcasting Co., Inc., FCC 63-821, released September 16, 1963, 25 R.R. 903, at paragraph 7. For this reason, we have carefully considered the pleadings filed by WUST in support of its request for this issue. Our examination reveals, however, that WUST failed to make any specific allegations of fact showing that B-CC's principals' interest in the advertising agency and in the broadcast station would be contrary to the public interest. Under this circumstance, we agree with the Board that there is no basis for the addition of such a disqualifying issue in this proceeding.

*2 3. B-CC's petition to enlarge issues and its ensuing application for review are founded upon certain of our actions in designating this proceeding for hearing. Issue (c), supra, was specified pursuant to our Policy Statement on 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 FCC 2d 190, 6 R.R. 2d 1901 (1965), in light of the fact that the 5-mv/m contour of WUST's application for improved facilities would penetrate the geographic boundaries of Washington, D.C. The designation order also considered the application of section 73.25(a)(5)(ii) of the rules to WUST's proposal to increase power. That section, which provides for the operation of daytime-only stations on 1120 kc within the continental United States with the facilities authorized as of October 30, 1961, was adopted because of the Clear Channel proceeding, 31 FCC 565, 21 R.R. 1801 (1961), to protect those channels from additional interference. As we have recently indicated (FCC 66-944, released November 4, 1966), that rule was waived to permit

consideration of WUST's application to increase power in this hearing because it had been filed before the conclusion of the Clear Channel proceeding and because it was in compliance with our rules when it was filed.

4. On July 7, 1966, B-CC filed a petition with the Review Board requesting that the issues in this proceeding be enlarged: (a) To determine whether WUST's application for renewal of its license will provide a realistic local transmission facility for Bethesda or for another larger community; (b) to determine, if it is concluded that WUST's application to increase power will provide a realistic local transmission facility only for another community, whether WUST or B-CC would provide a more fair, efficient, and equitable distribution of radio service; and (c) to determine, if it is concluded that WUST's application to increase power will provide a realistic local transmission facility only for another community, whether that application should be dismissed as violative of section 73.25(a)(5)(ii) of the rules. Although B-CC claimed that its application would rebut any presumption arising from the 307(b) policy statement, B-CC stated that it would not object if requested issue (a) were framed to include its proposal as well as WUST's renewal application.

5. Without considering the merits of B-CC's petition, the Review Board noted (FCC 66R-355, released September 15, 1966) that its delegated authority permits it to change the designated issues only when it is justified by newly discovered factual allegations or when it is shown that some matters have been overlooked by the body designating the matter for hearing. The Board then held that the face of the designation order in this proceeding shows that, when this matter was designated for hearing, the Commission was fully cognizant of the matters upon which B-CC relies in support of its petition (i.e., the 307(b) policy statement, the penetration of Washington by the respective 5-mv/m contours of the B-CC and WUST renewal proposals, and the applicability of section 73.25(a)(5)(ii) of the rules). Since B-CC had 'alleged no new facts or circumstances to support its request to modify the issues,' and since the matters relied upon by B-CC had not been overlooked by the Commission, the Board stated that such modification of the issues would require reconsideration and modification of an action taken by the Commission with full cognizance of all the pertinent facts. The Board held that it is not authorized to take such an action, citing Fidelity Radio, Inc., 1 FCC 2d 661, 6 R.R. 2d 140 (1965), and concluded that B-CC's petition to enlarge issues should be denied.

*3 6. Now pending before us is an application, filed September 22, 1966, by B-CC for review of that action taken by the Review Board. B-CC argues that we should review the Board's action, since the Board's refusal to examine the merits of its petition is contrary to established policy, citing Fidelity Radio, supra, and since the merits of the petition to enlarge issues involve questions not previously resolved by the Commission. B-CC contends that the Board errs when it concludes that the petition to enlarge issues would require reconsideration and modification of the Commission's designation order. B-CC points out that the designation order makes no reference to the location of the 5-mv/m contours of its or WUST's renewal proposals; that it is silent as to say any 307(b) comparison, if WUST's 5,000-w proposal is deemed to be for Washington rather than for Bethesda; and that our memorandum opinion and order (FCC 66-525), released June 15, 1966, refused to waive section 73.25(a)(5)(ii) with respect to WUST's 1,000-w proposal for Washington.

7. Although WUST has not filed any response to B-CC's application for review, the Broadcast Bureau has filed comments on it. The Bureau argues that the Board's construction of Fidelity Radio is generally correct to the extent that the Board concluded that it lacks authority to modify the issues with respect to matters about which the Commission was cognizant when the designation order was released. Thus, the Bureau urges that the Board properly denied B-CC's requests for a 307(b) policy statement issue and for a section 73.25(a)(5)(ii) issue. However, the Bureau states that it is not clear whether we intended to permit WUST to increase power, if it is concluded that WUST is a Washington transmission service, but that a 307(b) issue should be added if such an operation by WUST would be permissible. In reply, B-CC claims that the Bureau is inconsistent in claiming that Fidelity Radio precludes the addition of some issues, and then in suggesting that it would permit the addition of a contingent 307(b) issue. B-CC argues that Fidelity Radio should not bar its request for additional issues, since the designation order does not show a thorough consideration of the matters raised in its petition.

8. B-CC's application for review presents two separate questions for our consideration: First, whether the Review Board acted correctly in denying B-CC's petition to enlarge issues without considering the merits of the request; and, second, whether, if the merits of B-CC's petition are entitled to consideration, the issues in this proceeding should be enlarged. In considering the first question, it is

important to review the framework within which we have delegated power to the Review Board to treat certain matters. Section 0.361 of the rules provides for the general delegation of authority to the Board and section 0.365(b)(1) specifically provides that the Board will take original action on 'petitions to amend, modify, enlarge, or delete issues upon which the hearing was ordered.' In accordance with that delegation of authority, we revised sections 1.106(a) and 1.111 of the rules to make clear that petitions for reconsideration of designation orders would be entertained only: (a) When they relate to an adverse ruling with respect to the petitioner's participation in the hearing, or (b) when they assert that the petitioner's application should have been granted without hearing, FCC 65-594, released July 9, 1965.

*4 9. In Fidelity Radio, supra, one of the applicants had filed a petition for reconsideration of an interlocutory action taken in the designation order prior to the revision of sections 1.106(a) and 1.111. We emphasized in Fidelity Radio that we would no longer consider such interlocutory requests and that they should thereafter be directed to the Review Board and the presiding examiner. In order to give the public and the subordinate officials guidance as to the manner in which such pleadings should be handled in the future, we indicated that those subordinate officials would have broad discretion to consider such matters even though this might appear to necessitate reconsideration of a previous Commission action. We pointed out that, where there had been a thorough consideration of the particular question in the designation order, the subordinate officials would be expected, in the absence of new facts or circumstances, to follow our judgment as the law of the case. But we added that the subordinate officials would be justified in reaching a different conclusion with respect to a particular question when it is established that we had not fully considered the matter in the designation order. At the same time, we also stated that the failure to allege previously unknown facts would not, in itself, be a sufficient reason for the subordinate officials to deny such interlocutory requests.

10. In light of the preceding discussion, we are persuaded that the Review Board erred in failing to consider the merits of B-CC's petition to enlarge issues. While the matters relied upon by B-CC may have been before us in a peripheral manner when this proceeding was designated for hearing, it is clear that none of those matters was specifically considered by us in the context of the issues requested by B-CC and that B-CC has not been given a reasoned analysis of why the issues in this proceeding should not be enlarged. Such a narrow construction by the Review Board of its authority leads the parties, in order to obtain a resolution of the merits of their requests, to file additional applications for review, which multiply the legal pleadings required of the parties, which necessitate duplication of previous efforts of our staff, and which increase the number of interlocutory petitions which we must consider. In the future, we suggest that subordinate officials should look to see whether specific reasons are stated for our action or inaction in a designation order, rather than merely considering whether the petitioner relies on new facts or whether we were aware of the general matter upon which he relies. If our designation order contains a reasoned analysis of a particular matter, we are confident that, in the absence of additional information on the subject previously unknown to us, the subordinate officials will have no difficulty in adopting that analysis and denying the relief requested. But where the designation order contains no reasoned analysis with respect to the merits of that particular matter, the subordinate official should make such an analysis and rule on the merits of the petition so that the hearing may be conducted in an orderly and expeditious manner.

*5 11. For these reasons, we are convinced that B-CC is entitled to consideration of its petition to enlarge issues on the merits. With respect to its request for a further issue based on our 307(b) policy statement, it must be noted that paragraph 8 of the 307(b) policy statement specifically limits it to applications for new or improved standard broadcast facilities. B-CC has not presented any reason for expanding the scope of the 307(b) policy statement to include all existing facilities, and we are not persuaded that the public interest would be served by applying that policy statement to renewal applications, such as WUST has filed in this proceeding. By the same token, we have also concluded that the policy statement need not be applied in cases where a new application has been filed for essentially the same facilities as an existing station presently utilizes. Thus, B-CC's request for a further issue based on our 307(b) policy statement must be denied.

12. As we indicated in paragraph 3, supra, our waiver of section 73.25(a)(5)(ii) of the rules in this proceeding was founded upon the facts that WUST's proposal was filed prior to the conclusion of the Clear Channel proceeding, supra, and that it was in compliance with our rules when it was filed. In light of these circumstances, we are convinced that there would be no basis for B-CC's requested section 73.25(a)(5)(ii) issue merely because it may be

concluded, pursuant to the 307(b) policy statement issue, that WUST intends to provide a realistic local transmission service for a community other than its specified station location. However, our further consideration of these matters has persuaded us that, although WUST may amend its proposal to specify operation with 1,000 w in Washington, D.C., pursuant to our memorandum opinion and order (FCC 66-944), released November 4, 1966, B-CC's request for a contingent 307(b) issue should be granted in light of the issues presently specified in this proceeding. Since B-CC proposes to serve Bethesda, Md., and since it may be determined that WUST's application to increase power will provide a realistic local transmission service for a community other than Bethesda, it is clear that a contingent 307(b) issue should be included to determine which proposal would better provide a fair, efficient, and equitable distribution of radio service. Generally speaking, the proceedings to which we have added 307(b) policy statement issues have also included standard 307(b) issues, and, therefore, a contingent 307(b) issue will be added to this proceeding in conformity with our usual practice.

13. Accordingly, It is ordered, This 23d day of November 1966;

(1) That the application for review, filed September 22, 1966, by Bethesda-Chevy Chase Broadcasters, Inc., Is granted to the extent reflected in this memorandum opinion and order, and in all other respects Is denied.

(2) That the issues in this proceeding Are enlarged as follows: To determine, in the event that it is concluded pursuant to the foregoing issue (4) that the WUST proposal will not realistically provide a local transmission service for its specified station location, whether, in the light of section 307(b) of the Communications Act, the application of Atlantic Broadcasting Co. (WUST) to improve its facilities (BP-14357) or one of the applications (i.e., the application for new construction permit of Bethesda-Chevy Chase Broadcasters, Inc., and the application for renewal of license of Atlantic Broadcasting Co. (WUST) for Bethesda, Md., would better provide a fair, efficient, and equitable distribution of radio service; and

***6** (3) That the application for review, filed October 7, 1966, by Atlantic Broadcasting Co. (WUST), Is granted to the extent of the clarification of the Review Board's memorandum opinion and order (FCC 66R-375, released September 30, 1966) contained in paragraph 2 of this memorandum opinion and order, and in all other respects Is denied.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, Secretary.

8 Rad. Reg. 2d (P & F) 991, 5 F.C.C.2d 717, 1966 WL 13933 (F.C.C.)
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Exhibit B

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FCC 68R-374

***1** In re Applications of JOHN P. HILMES, GEOFFREY B. KNUTSON, AND TOM E. BEAL, D.B.A. H-B-K ENTERPRISES, GRANDVIEW, MO.; BROADCASTING, INC., KANSAS CITY, MO. For Construction Permits

Docket No. 18183 File No. BP-13823; Docket No. 18184 File No. BP-14486

MEMORANDUM OPINION AND ORDER

(September 10, 1968 Adopted)

BY THE REVIEW BOARD

1. This proceeding involves the mutually exclusive applications of H-B-K Enterprises (H-B-K) and Broadcasting, Inc. (Broadcasting), for construction permits for standard broadcast stations at Grandview, Mo., and Kansas City, Mo., respectively, operating unlimited time on 1190 kHz. The applications were designated for hearing by Memorandum Opinion and Order, FCC 68-521, released May 15, 1968. Now before the Review Board is a motion to enlarge issues, filed on June 3, 1968, by Broadcasting, requesting an issue to determine whether the H-B-K proposal is consistent with the provisions of a United States-Mexican agreement. [FN1]

2. In support of its request, Broadcasting contends that, under an agreement between the United States and Mexico, dated January 29, 1957, the United States is required to afford protection to Mexican class I-B station XEWK, operating at Guadalajara, Jalisco, on 1190 kHz; that the agreement provides, among other things, that, if higher power is used by the Mexican station, the directional antenna shall restrict the radiation to 870 mv/m, unattenuated filed at 1 mile, over an arc between the true bearings 323 and 343 degrees; that station XEWK, presently operating with 50 kw daytime and 10 kw night-time, has notified the United States of its intention to operate with 50 kw, unlimited time, with directional antenna at night but it has not submitted an antenna pattern; and that, since a Mexican class I-B station must be protected within its boundaries from objectionable interference from stations operating on the same channel to its 0.5-mv/m 50-percent skywave nighttime contour, the H-B-K proposal would contravene the United States-Mexican agreement as a result of overlap of the H-B-K proposed 0.025-mv/m 10-percent skywave contour with the XEWK 0.5-mv/m 50- percent skywave contour by 24 miles on the bearing 222.1 degrees from the H-B-K site. [FN2] The Broadcast Bureau supports the motion to enlarge issues.

3. Opposing the request, H-B-K, supported by a statement from its engineer, alleges that its proposal would not violate the provisions of the treaty. H-B-K notes that this matter was raised prior to designation by the Commission in a letter, dated May 19, 1965, and resulted in an amendment to H-B-K's application, dated June 30, 1965, to resolve the problem. Finally, H-B-K states that station XEWK has not submitted its directional antenna pattern, and therefore it cannot be assumed that its proposal would actually result in objectionable interference with the Mexican station.

4. Although the problem raised here may have been inquired into when the application was tendered for filing, the petitioner has now raised a question as to whether the value of radiation originally attributed to station XEWK to determine whether there would be prohibitive overlap of the pertinent contours was a proper one. [FN3] Moreover, this

matter was not considered in the designation order, and therefore the Board is not foreclosed from consideration of the merits of the petition. See Atlantic Broadcasting Co. (WUST), 5 FCC 2d 717, 8 R.R. 2d 991 (1966). H-B-K contends that, by its calculations, there will be no overlap of the pertinent contours. However, the analysis appearing in paragraph 3 of the Broadcast Bureau's comments raises a sufficient question as to a possible contravention of the United States-Mexican agreement, [FN4] to warrant resolution of the problem at an evidentiary hearing before the hearing examiner. Thus the motion to enlarge issues will be granted.

***2** 5. Accordingly, It is ordered, That the motion to enlarge issues, filed June 3, 1968, by Broadcasting, Inc., Is granted; and that the issues in this proceeding Are enlarged by the addition of the following issue:

To determine whether the operation proposed herein by H-B-K Enterprises is consistent with the commitments of the United States and the priority assigned to Mexico for operation on 1190 kHz under the bilateral agreement between the United States and Mexico, dated January 29, 1957.

6. It is further ordered, That the burdens of proceeding and proof under the issue added herein will be on H-B-K Enterprises.

FEDERAL COMMUNICATIONS COMMISSION, BEN F. WAPLE, Secretary.

FN1 Other related pleadings before the Review Board are: (a) Broadcast Bureau's comments, filed June 25, 1968, and (b) answer to motion to enlarge issues, filed July 9, 1968, by H-B-K Enterprises.

FN2 Petitioner's allegations are supported by a statement from its consulting engineer.

FN3 In the engineering study contained in the H-B-K application, a radiation value of 705 mv/m was employed.

FN4 The agreement would be violated if petitioner's allegations are correct despite the fact that station XEWK has not submitted a directional antenna pattern since the agreement provides for protection to certain limitations.

FCC

1968 WL 13388 (F.C.C.), 14 Rad. Reg. 2d (P & F) 183, 14 F.C.C.2d 597

END OF DOCUMENT

Exhibit C

13 Rad. Reg. 2d (P & F) 109, 12 F.C.C.2d 862, 1968 WL 13982 (F.C.C.)

*1 In re Applications of JOHN P. HILMES, GEOFFREY B. KNUTSON, AND TOM E. BEAL, D.B.A. H-B-K ENTERPRISES, GRANDVIEW, MO. Requests: 1190 kc, 250 w, DA-1, U, Class II; BROADCASTING, INC., KANSAS CITY, MO. Requests: 1190 kc, 250 w, 1 kw-LS, DA-N, U, Class II For Construction Permits

MEMORANDUM OPINION AND ORDER

(May 8, 1968 Adopted)

BY THE COMMISSION: COMMISSIONERS LOEVINGER AND WADSWORTH ABSENT.

1. The Commission has before it the above-captioned mutually exclusive applications and a pleading in the nature of a petition to deny directed against Broadcasting, Inc., by Westinghouse Broadcasting Co., Inc., licensee of station WOWO, Fort Wayne, Ind.

2. Grandview, Mo., is a part of the Kansas City, Mo., urbanized area and is, in fact, virtually surrounded by the southern end of Kansas City proper by virtue of recent annexations. The proposed 5.0-mv/m contour of H-B-K Enterprises (H-B-K), the Grandview applicant, penetrates the geographic boundary of Kansas City. Inasmuch as the population of Kansas City, Mo. (475,539), is over 50,000 and more than twice the population of Grandview (10,116), [FN1] a presumption arises that this applicant realistically proposes to serve Kansas City rather than Grandview. [FN2]

3. In attempting to rebut the aforementioned presumption, the applicant, on August 8, 1966, filed an amendment pointing out that Grandview, with a present estimated population of 15,000, is a separate and independent municipality with its own city government (mayor, city administrator, and alderman), its own fire and police departments, school system, library, churches, bank, recreational facilities, industries, and businesses. H-B-K states that Grandview has a weekly newspaper with a circulation of approximately 6,300 as well as a weekly shopping paper, but that there is a pressing need for a radio station. Referring to a survey consisting of over 130 interviews with community leaders in various fields, H-B-K alleges that its programing is designed to meet the needs and interests of both the city of Grandview and the adjacent Air Force base, and that it will also attempt to provide broadcast coverage to the nearby towns of Belton, Raytown, and Ruskin Heights.

4. H-B-K states that it also conducted a survey of potential advertising revenue available in Grandview, and that it has concluded, based on personal contact with over 100 businessmen engaged in over 40 businesses in Grandview, that there is sufficient advertising revenue from Grandview to adequately support its proposed operation, and that the 53 businesses in Truman Corners Shopping Center alone had a retail volume of sales in excess of $15 million in 1965.

5. Pointing out that it proposes the minimum power of 250 w, the applicant states that had it sought Kansas City coverage it would have applied for greater power. H-B-K contends further that it would be impossible to provide a local service to Grandview without penetrating Kansas City. The applicant, in its engineering statement, alleges that the location of the proposed transmitter site east of Grandview was dictated by protection of existing stations and air safety requirements and the need to provide adequate coverage of Grandview under the rules. Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, FCC 66-229, 6 R.R. 2d at 1910. [FN3]

*2 6. After careful examination of the above showing, the Commission finds that H-B-K has failed to overcome the aforementioned presumption. Therefore, a suburban community issue will be included as to that applicant.

7. On February 14, 1966, Westinghouse Broadcasting Co., Inc., filed an objection to grant, asserting that the Broadcasting, Inc., proposal would result in objectionable nighttime interference to WOWO if current amplitudes of certain of the proposed towers vary by less than the 5 percent permitted by section 73.57 of the Commission's rules. Westinghouse also alleged that Broadcasting, Inc., made no showing as

to the means proposed for maintaining antenna parameters within limits sufficient to avoid interference to the protected WOWO contours. On the basis of Broadcasting's application, including an amendment filed July 24, 1967, to reduce nighttime power and change radiation pattern, the Commission finds that this applicant's proposed operation will not cause interference to station WOWO. Accordingly, the petition will be denied.

8. Examination of Broadcasting, Inc.'s application indicates that the proposal fails to provide the nighttime city coverage required by section 73.188 of the rules, since the 5-mv/m contour does not cover the entire city. Accordingly, an appropriate city coverage issue will be specified.

9. Based on the information before the Commission, it appears that, except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. However, because the applications are mutually exclusive, they must be designated for hearing in a consolidated proceeding, on the issues set forth below.

10. Accordingly, It is ordered, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the applications Are designated for hearing in a consolidated proceeding, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine the areas and populations which would receive primary service from each of the proposals and the availability of other primary service to such areas and populations.

2. To determine whether the proposed nighttime 5-mv/m contour of Broadcasting, Inc., would provide coverage of the city sought to be served, as required by section 73.188 of the Commission's rules, and, if not, whether circumstances exist which would warrant a waiver of said section.

3. To determine whether the proposal of H-B-K Enterprises will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(a) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programing needs;

(b The extent to which the needs of the specified station location are being met by existing standard broadcast stations;

*3 (c) The extent to which the applicant's program proposal will meet the specific unsatisfied programing needs of its specified station location; and

(d) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

4. To determine, in the event that it is concluded pursuant to the foregoing issue (a) that the proposal will not realistically provide a local transmission service for its specified station location, whether such proposal meets all of the technical provisions of the rules for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service, namely, Kansas City, Mo.

5. To determine, in the light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient, and equitable distribution of radio service.

6. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to section 307(b), which of the operations proposed in the above-captioned applications would better serve the public interest.

7. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

11. It is further ordered, That, in the event of a grant of either application, the construction permit should contain the following condition:

Any presunrise operation must conform with sections 73.87 and 73.99 of the rules, as amended June 28, 1967 (32 F.R. 10437); supplementary proceedings (if any) involving docket No. 14419; and/or the final resolution of matters at issue in docket No. 17562.

12. It is further ordered, That the petition by Westinghouse Broadcasting Co., Inc., Is denied.

13. It is further ordered, That, to avail themselves of the opportunity to be heard, the applicants herein, pursuant to section 1.221(c) of the Commission's

rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

14. It is further ordered, That the applicants herein shall, pursuant to section 1.594 of the Commission's rules and section 311(a)(2) of the Communications Act of 1934, as amended, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION, BEN F. WAPLE, Secretary.

1 Although these population figures are both based on the 1960 U.S. census, the Grandview figure includes population areas which have been annexed to Grandview since the 1960 census.

2 Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 FCC 2d 190, 6 R.R. 2d 1901.

3 H-B-K indicates that locating south of Grandview was impractical because of Richards-Gebaur AFB; to the west was inconsistent with coverage requirements of the rules with respect to Grandview and protection of station WOWO, Fort Wayne, Ind.; and to the north was inconsistent with the service to Grandview and its trade area to the south.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent for filing on this 11th day of December 2007, by hand delivery, to the following:

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